name which would lead the public to believe that defendants are associated with plaintiff''. On July 20, 1962, the Court below affirmed the District Court's judgment and remanded the case to that court for the allowance of counsel fees (Case No. 5962) p. 13 *infra*.

Thereafter, on remand, the District Court on December 20, 1962 (R 5, Case No. 6137) awarded respondent $136,-868.77 for counsel fees and disbursements, and referred respondent's claim for damages to a master (R 4, *ibid*). The Master filed a report (R 6, *ibid*) recommending damages to the extent of some $475,000.00 (R 6, *ibid*) which the District Court doubled, to which it added counsel fees, and entered judgment for respondent of $1,094,779.94 (R 20-21, *ibid*). On December 26, 1963, the Court below vacated the judgment of the District Court and remanded the case to the District Court for further proceedings because of irregularities by the master in reliance upon an expert witness *in camera* in the preparation of his report (R 105, *ibid*).

Thereafter, on January 30, 1964, the District Court referred the case to the same master who filed his Second Report (I 75 Case No. 6383) affirming the findings of damages made in his initial report. The Court (McCarthy, J.) made statements to counsel for respondent, during a conference before the master, terming petitioner a crook, seeking bankruptcy, ''who admitted committing perjury before me and before the Registration Office in Washington'' (I 36, *ibid*). Petitioner objected to the Second Report of the master on the ground of prejudice by the District Court and the master and resulting denial of due process (I, 81 *ibid*). The Court (Chief Justice Sweeney in place of McCarthy, J. deceased) confirmed the master's Second Report, ordered the findings of damages doubled, added counsel fees and entered judgment against defendant, as in Case No. 6137 for $1,094,779.94 (I, 82, 83 *ibid*).

The Court below on April 2, 1965 affirmed the judgment of the District Court (I 91 *ibid*). p. 41 *infra*.

Reasons for Granting the Writ

1. The decision of the court below in *Baker* v. *Simmons*, 307 F2d 459, (1962) Case. No. 5962 conflicts in principle with the decision of the Court of Appeals for the Seventh Circuit in *Anchor Serum Company* v. *Federal Trade Commission*, 217 F 2d 867 (1954). Appendix C. p. 47 *infra*.

In *Anchor Serum*, the petitioner made contracts with certain customers for the sale of hog serum with the proviso that in consideration of the use of the sellers' trade name, "Anchor", these customers agreed to purchase all their requirements of serum from the seller.

In the case at bar, respondent leased signs bearing its trade name "Beautyrest by Simmons" to its hotel and motel customers, on condition that the lessees buy all their mattresses from respondent.

In *Anchor Serum*, the Seventh Circuit rejected the contention that the contracts were necessary in order to insure the proper use and protection of petitioner's trade name. It held that Section 3 of the Clayton Act made no provision for such contingencies, and that such contention, if adopted, would permit an easy avoidance of Section 3.

> "Nothing more would be required by the contracting parties, irrespective of the effect which their contract might have upon competition than that there be included in the contract the right or privilege on the part of the purchaser to use the trade name of the seller." (*Ibid* at 871)

In the case at bar, the court below held precisely to the contrary, that the proper use and protection of the respondent's trade name justified " 'tying' or conditioning

the use of its signs on the purchase of its mattresses" (IV 1091 Case No. 5962).

> "In short, where the clear import of the sign program was to convey the message that a Beautyrest awaited the traveler inside, the Simmons Company had ample justification to insure that the realization met this expectation". (*Ibid* 1091).

In *Anchor Serum*, the Seventh Circuit held that "there was no legal issue . . . as to whether the contracts were illegal *per se;* the only legal issue . . . was whether the contracts with their restrictive provisions were calculated to have the proscribed effect or consequences" (217 F 2d at 870) of substantially lessening competition, tending to create a monopoly or impeding a substantial amount of competitive activity.

In the case at bar, the court below did not reach this issue. Instead, it stopped short, on the basis that the respondent had "a legitimate business justification as opposed to an improper motive . . . an eminently legitimate interest to protect in 'tying' or conditioning the use of the signs on the purchases of its mattresses . . . a right, indeed, a duty, to insure the truthfulness of its advertising and to exclude the possibility that a careless or capricious innkeeper might short change his guests with a different mattress." (at 1091).

It referred to a dispute between the parties, and lack of finding by the District Court on whether the volume of commerce affected by the sign-mattress arrangements should be regarded as substantial within the meaning of *International Salt Co.* v. *United States,* 332 U.S. 392 (1947); *Times Picayune* v. *U. S.,* 345 U.S. 594 (1953); *Northern Pacific Railway Co.* v. *U. S.,* 356 U.S. 1 (1958) and "whether Simmons 20 per cent of the mattress market in the United

States gave them sufficient economic power to impose an appreciable restraint on free competition in the tied product." (R 31) But it declined to decide these questions, because it found that respondent was exculpated from the reach of the anti-trust laws, because actuated by a proper motive (I 1089-1090 *ibid*).

2. Clearly, the question presented is important in the administration of the federal anti-trust laws. The court below has already held in *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F 2d 653, 655, cert. den. 368 U.S. 391 (1 Cir. 1961) that "proper motive" takes business arrangements, otherwise literally within the language of the Act, out of the reach of the Act and is apparently committed to the concept of "proper motive" as an exculpating principle. If "truth in advertising" or proper use and protection of a trade name justify a violation of the anti-trust laws, the matter should, in the public interest, be settled by this Court and the conflicting decisions of the Courts of Appeal for the First and Seventh Circuits be resolved.

3. The decision of the Court below is believed to be erroneous and the conflicting decision of the Seventh Circuit Court of Appeals in *Anchor Serum Co.* v. *F. T. C., supra* correct. In *Timken Roller Bearing Co.* v. *U. S.*, 341 U.S. 593, 599 (1951), this Court said

> "A trade mark cannot legally be used as a device for Sherman Act violation. Indeed, the Trademark Act of 1946 itself penalizes use of a mark 'to violate the anti-trust laws of the United States' ".

The decision of the court below permits the use of a mark or name to justify Clayton Act violation, on the basis that truth in advertising is a proper motive and exculpates violation. As the Court in *Anchor Serum supra* rightly observed, Section 3 of the Clayton Act makes no provision

for such a contingency. We submit that there is no good reason in legislative history or the policy of the anti-trust laws to read such an exculpating principle into the Act.

4. The question presented as to whether proof of a violation of the anti-trust laws constitutes a complete defense to an action for trade mark infringement under the Lanham Act is important in the administration of the Lanham Act and has not been, but should in the public interest, be resolved by this Court.

Mr. Justice Black's reference in *Timken Roller Bearing Co., supra*, to the Act of 1946 does not resolve the question of what penalty the Act imposes on the use of a trade mark to violate the anti-trust laws. There are conflicting decisions and dicta in the lower courts, to the effect, on the one hand, that a mark which has become incontestable under the provisions of the Lanham Act may not be enforced where it has been or is being used to violate the anti-trust laws (*Forstman Woolen Company* v. *Murray Sices Corp.*, 10 F. R. D. 367; *G. D. Searle & Co.* v. *Institutional Drug Co. Distributors Inc.*, 151 F. Supp. 715 S. D. Calif. 1957; *Forstman Woolen Co.* v. *Alexanders Dep't. Stores Inc.*, 11 F. R. D. 405, 407 S. D. N. Y. 1951) and to the effect, on the other hand, that the Lanham Act deprives a misuser of a trade mark of certain evidentiary advantages but it does not strip him of his mark nor constitute a complete defense to a trade mark infringement action. *Cott Beverage Corporation* v. *Canada Dry Ginger Ale Inc.*, 146 F. Supp. 300, 303 (S. D. N. Y. 1956) appeal dismissed 243 F 2d 795 (2d Cir. 1957). See *"The Anti-Trust Defense in Trade Mark Infringement Actions"* 45 Va. L. R. 94 (1959).

The court below did not reach this question, in view of its determination that respondent had engaged in no violation of the anti-trust laws. The question, so far as petitioner can ascertain, has not been resolved. The importance of both trade marks and competition in contemporary

American life and commerce justify the allowance by this Court in the public interest of the petition on this score.

5. This Court in the exercise of its supervisory powers over the lower federal courts has, in this case, the opportunity to establish the necessary criteria for relations between the District Courts and masters appointed pursuant to F. R. C. P. Rule 53, and also to correct a wrong caused by the intemperate, prejudiced and unfounded attack on a litigant by the District Judge. The District Judge, McCarthy, J., in a telephone conference transcribed at the hearing before the master termed petitioner a "crook", seeking bankruptcy, who has admitted committing perjury before me and before the Registration Office in Washington (I, 36 Case No. 6383). The petitioner has not sought bankruptcy and the record is barren of any evidence that he admitted committing perjury before Judge McCarthy or anyone else. The court below held that in view of its opinion in the 1962 case, (Case No. 5962) "we scarcely think the judge's remarks could have had prejudicial effect on him. In addition, the record fails to indicate any bias or prejudice by the master himself. We therefore need not reach the question of whether the district judge's remarks amounted to a showing of bias and prejudice". (I 92 Case No. 6383)

This holding raises but does not resolve the problem. The provisions of F. R. C. P. Rule 53 make the master's findings of fact "armoured with a strong presumption of validity" *E. I. Dupont Nemour & Co.* v. *Purofied Down Products Corp.*, (D. C. N. Y. 1959) 176 Fed. Supp. 68 "which should not be disturbed because trial court has a different opinion or is dissatisfied with master's findings" *Leader Clothing Co.* v. *Fidelity & Cas. Co. of N. Y.*, 10th Cir. 1956 237 F 2d 7. The necessary effect of such an intemperate attack upon the petitioner by the district judge is to violate the impartiality required of the master and

thus to vitiate both the master's findings and the district judge's action thereon. ". . . the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurances that they are impartial. . ." *Berger* v. *United States*, 255 U.S. 22, 35. The district judge's bias can reasonably be deemed to extend back to the trial in Case No. 5962 and to have permeated his conduct in the succeeding trials. It can reasonably be deemed to have affected his conduct in doubling the master's award of damages against petitioner in Case No. 6137 and to have affected his judgment in passing on petitioner's motions to strike evidence and other motions in each of the trials.

The court below says that the master could not have been prejudiced by the district judge in Case No. 6383 because the district judge made findings against petitioner which the court below upheld in Case No. 5962. This bootstrap logic solves nothing. If the district judge was prejudiced, which the court below refused to decide, he was prejudiced all the way and his findings against the petitioner in Case No. 5962 cannot be used to justify the lack of effect of his prejudice on the master in Case No. 6363. The proper role of district judge and master requires definition by this Court. More important, petitioner's right to a fair hearing requires review by this Court of the action of the district judge and of the court below in failing to meet this challenge to the integrity of the judicial process.

Conclusion

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,
MAURICE SCHWARTZ
Counsel for Petitioner

May 18, 1965

Appendix A

Statutes Involved

15 U S C § 1115 (b) If the right to use the registered mark has become incontestable under Section 1065 of this title, the registration shall be conclusive evidence of the registrants exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the affidavit filed under the provisions of said Section 1065, subject to any conditions or limitations stated therein except where one of the following defenses or defects is established. . . .

(1) That the mark has been or is being used to violate the anti-trust laws of the United States July 5, 1946 c 540, Title VI § 33, 60 Stat 438, Oct. 9, 1962 Pub. L. 87-772 § 18, 76 Stat 774.

15 U S C § 14 It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

15 U S C § 1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in Sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1. 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Appendix B

United States Court of Appeals
For the First Circuit

No. 5962.

ABRAHAM (ABE) BAKER AS AN INDIVIDUAL AND ALSO D/B/A SIMMONDS UPHOLSTERING COMPANY, SIMMONDS UPHOLSTERING CO., INC., SIMMONDS SALES SYSTEM, INC. AND NEW ENGLAND UPHOLSTERING CO., INC.,

DEFENDANTS, APPELLANTS,

v.

SIMMONS COMPANY,

PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[200 F.Supp. 149]

Before HARTIGAN and ALDRICH, *Circuit Judges,* and GIGNOUX, *District Judge.*

C. Keefe Hurley, with whom *Earle C. Cooley* was on brief, for appellants.

Francis A. Even, with whom *William E. Anderson*, *Michael S. Dukakis*, *Soans, Anderson, Luedeka & Fitch* and *Hill, Barlow, Goodale & Adams* were on brief, for appellee.

OPINION OF THE COURT,
July 20, 1962.

HARTIGAN, *Circuit Judge.* This is an appeal from an injunction issued by the District Court of the United States for the District of Massachusetts on November 16, 1961 in an action involving trademark infringement and unfair competition.

Plaintiff, appellee — the Simmons Company — is one of the nation's leading manufacturers of mattresses and box springs. Plaintiff's predecessor company first began manufacturing beds and bed springs for the public under the name Simmons in 1899. In 1959 plaintiff had a business volume of $132,600,000. It now sells approximately twenty per cent of all the mattresses sold in the United States. Simmons average annual advertising expenditures is about $2,000,000. While it manufactures furniture for a variety of purposes and rooms, the overwhelming majority of its productive efforts and advertising are directed towards the marketing of products possessing a "sleep feature."[1]

Every product leaving the plaintiffs plants bears the name "Simmons." On objective record evidence, it was demonstrated that the Simmons name is well known to the American public, and its reputation is good.

The individual defendant's name is Abraham Baker. Baker is the sole owner of two of the corporate defendants, Simmonds Upholstering Co., Inc., and New England Upholstering Co., Inc. He also held the controlling shares in the Simmonds Sales System, Inc. All corporate defendants were organized under the laws of Massachusetts. Defendants are in the reupholstering business and their history is as follows:

In 1935 Baker opened a retail furniture business in Lawrence, Massachusetts, under the name "Baker Furniture Co." This venture, under the Baker name, apparently continued as a small retail outlet until 1945. Some time around 1940, Baker started a reupholstering operation as an adjunct to and in the same building as his

[1] For example, of plaintiff's 1959 sales volume $28,000,000 was attributable to the sale of the Simmons "Hide-A-Bed" and other dual purpose equipment which, while designed for living room use, could be quickly converted to a bed.

furniture business. This new venture was styled the "Simmonds Upholstering Company." At the time that the "Simmonds" name was selected, the Baker Furniture store was solvent and according to Baker's testimony enjoyed a good reputation in the community.

Baker operated the "Simmonds Upholstering Company" as a sole proprietorship until 1952. In that year, defendant Simmonds Upholstering Co., Inc., which had been incorporated in 1950, became active in the reupholstering business. This corporation serves as the vehicle for selling reupholstering service to the public, purchasing fabrics, delivering the finished product, and financing the entire reupholstering operation. Defendant, New England Upholstering Company, is the manufacturing branch of Baker's corporate group and does the actual reupholstering. Defendant, Simmonds Sales System, Inc., now defunct, was organized in 1950 for the purpose of granting franchises to individual established reupholsterers so that they might operate under the name "Simmonds Upholstering Company." Franchises were granted in New York City and Albany, New York, New Jersey and in Pittsburgh and Detroit.

The advent of World War II, with its restrictions on the production of new living room sets possessing springs, proved a great boon to the reupholstering business. Baker's operations expanded significantly during this period and have continued to prosper through the years. In 1959 the defendants' annual volume from reupholstering services was $2,486,546.80.

With the demise of its franchise system the defendants' market for reupholstering service is concentrated primarily in the New England states and in the area of Albany, New York. Defendants advertise extensively throughout this area through the media of newspaper, radio, television and direct mail. Defendants do not main-

tain retail outlets for their reupholstering services but rely on home calls by the Simmonds sales force. In defendants' words, the thrust of the Simmonds advertising is to offer "such an attractive combination of low price, extra Value and premiums, that the prospective customer will pick up the telephone and call a branch office to request a visit from a salesman."

On October 10, 1958 plaintiff initiated the present action alleging unfair competition and trademark infringement and seeking to enjoin the defendants from using the name "Simmonds" and for other relief. Defendants denied infringement, asserted the affirmative defenses of laches and estoppel, that the defendants and their predecessors had been doing business under the name Simmonds since 1899, and thus had rights in the name "Simmonds" paramount to any which the plaintiff might have in "Simmons." Defendants further alleged that they neither sold nor manufactured goods of the kind manufactured by the plaintiff. Subsequently defendants amended their answer to assert the additional defense that plaintiff's "Beautyrest" Sign Program for motels was violative of certain provisions of the Sherman and Clayton Anti-trust Acts.

In September 1960 the defendants moved for summary judgment on the basis of their affirmative defenses, supported by affidavits, interrogatories and answers, together with pre-trial depositions. Plaintiff countered with deposition testimony bearing directly on the affirmative defenses as well as revealing substantial issues of fact. The court denied the motion for summary judgment.

In a motion by the defendants for reconsideration of the court's action relative to summary judgment, the defendants admitted for the sake of the motion, all of the facts asserted by the plaintiff in any and all of the pleadings and papers filed by the plaintiff. The court, thereafter,

reaffirmed its denial of summary judgment as a matter of law.

Trial began on September 21, 1960. On the fifth day of trial the defendants moved again to further amend their answer to plead as a further defense an alleged violation by the plaintiff of Section 2(d) of the Clayton Act as amended by the Robinson-Patman Act. The trial lasting fifty days ended on March 3, 1961.

On November 15, 1961 the trial court entered its findings of fact and conclusions of law and on the following day enjoined the defendants "from using the name 'Simmonds' and from using any other name or representation which would lead the public to believe that defendants are associated with the Plaintiff."

In issuing the instant injunction the district court made the following crucial finding of fact:

"E. CONFUSION

"21. I find on all the evidence that the name 'Simmonds' as it has been used in the conduct of the DEFENDANT'S business is indistinguishable when spoken from 'Simmons', has been of a most confusing character, and that its use by the Defendants has not only in the past, but is likely in the future to cause confusion among the purchasing public in New England and elsewhere."

This finding and the ramifications thereof are central to the present action.

In an action for infringement of a protected trademark or name the test is that of confusing similarity. Thus under the Lanham Act it is incumbent upon a court to determine whether a defendant's use of the contested mark is likely to cause confusion or mistake or to deceive purchasers as to "the source of origin of [the plaintiff's] goods or services." § 32 (1) 15 U.S.C. § 1114(1). Moreover, "What has

been said respecting infringement applies as well to the cause of action for unfair competition, which is but a somewhat broader phase of the same wrong. The gist of this action is the likelihood that the goods of the defendant will be passed off as those of the plaintiff. [citing cases]." *Standard Brands* v. *Smidler*, 151 F.2d 34, 37 (2 Cir. 1945). In sum, both actions, i.e., trademark infringement as well as unfair competition, in addition to according legal protection to the property right which has been established in a given name, seek to insure that the public is not misled into purchasing or utilizing goods or services different from those sought by the pull and lure of a subtly devised parody of a familiar name or symbol. To put it more directly, one cannot ride on the coattails of another's reputation where the indicia of that reputation is legally protected. As was stated in *LaTouraine Coffee Co.* v. *Lorraine Coffee Co.*, 157 F.2d 115, 118 (2 Cir. 1946), cert. den. 329 U.S. 771:

> "The Supreme Court has pointed out the law's recognition of the 'psychological function of symbols' in protecting trademarks, adding that once the owner has impregnated 'the atmosphere of the market with the drawing power of a congenial symbol' then the owner can obtain redress 'if another poaches upon the commercial magnetism of the symbol he has created.' Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U. S. 203, 205, 62 S.Ct. 1022, 1024, 86 L.Ed. 1381."

Plaintiff's trademark "Simmons" is registered in the United States Patent Office under Registration No. 137,699 dated November 30, 1920, Renewed November 30, 1940; Registration No. 532,319 dated October 24, 1950 and Registration No. 548,280, dated September 18, 1951.[2]

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[2] "Simmons" is also included under Registration No. 661,772 in combination with another of plaintiff's trademarks, "Beautyrest." The mark embraced by Registration No. 661,722 is "Sleep Best on Beautyrest by Simmons."

With the "Simmons" name in the market place since 1899 trademarked since 1920, and enjoying a good reputation for quality sleep and allied products, the question is whether the advent of a reupholstering firm styled "Simmonds" in the 1940's had the proscribed proclivity of engendering a "likelihood of confusion" in the public mind. The district court held that such proclivity existed. We agree with that finding.

Defendants' attack on the trial court's finding of likelihood of confusion takes several tacks. Initially, defendants dwell at length on asserted distinctions between the operations of Simmons and Simmonds, arguing that the cumulative effect of these distinctions militate against the likelihood of a misled or duped public. These alleged distinctions range from the obvious, e.g., Simmons as a manufacturer of new sleep products to Simmonds as a purveyor of reupholstering services, down through the more attenuated ones of the nature and purposes of advertising and class of clientele of the respective parties. The upshot, in defendants' view is that the dissimilarity in product use and marketing practice exclude the likelihood of substantial consumer confusion.

We can bypass consideration of the inferences to be drawn from a lack of strict functional interchangeability[3] because the zone of protection which the law extends in

[3] Although on this score the record indicates that defendants regarded new furniture as their prime competitive factor and thus at least in the area of Simmons' substantial market for the living room —based "Hide-A-Bed," the two concerns were face to face in direct competition. Moreover, since 1958 Simmons has operated a separate Living Room Division. It might be noted in passing that while defendants have consistently maintained that its business is the selling of reupholstering services and not the manufacture of new furniture, this distinction may be more illusory than real. The record indicates that it frequently happened that customers who sent their old living room sets to the defendants for "refinishing" received back a new set in the sense that no constituent thereof, e.g., frame, etc. had ever before been in the customer's home.

this area is far broader and frequently reaches to the area of what might be termed noncompeting goods. Thus producers of "V-8" vegetable juice cocktail could enjoin the use of "V-8" vitamin tablets. *Standard Brands v. Smidler, supra.* Manufacturers of the "Yale" lock could enjoin attempted introduction of a "Yale" flashlight. *Yale Electric Corporation* v. *Robertson,* 26 F.2d 972 (2 Cir. 1928); as could the producer of fountain pens compel a similar result in the case of a razor blade manufacturer. *L. E. Waterman Co.* v. *Gordon,* 72 F.2d 272 (2 Cir. 1934). In fine, "The protection which the law gives the owner of a trade mark is not confined to the goods upon which it is, or has been, used by the owner of it but extends to products which would be reasonably thought by the buying public to come from the same source if sold under the same mark (citations omitted). His mark is the brand by which his goods can be identified, and when it is used by another the reputation of his mark, and consequently his own business reputation, are placed to that extent beyond his control. Unless the use by that other is upon goods so unlike his own or in territory so far from that which he has exploited that it will not create confusion, it will be enjoined." *Standard Brands* v. *Smidler, supra,* at 37.

We feel that upon a consideration of the totalities of the environmental and marketing context that reupholstering services and the production of mattresses and allied sleep products possess a relationship sufficiently viable to invoke the familiarly accepted legal principles outlined above. *Standard Brands* v. *Smidler, supra; L. E. Waterman Co.* v. *Gordon, supra; Yale Electric Corporation* v. *Robertson, supra.* See *Triangle Publications* v. *Rohrlich,* 167 F.2d 969 (2 Cir. 1948); *Hanson* v. *Triangle Publications,* 163 F.2d 74 (8 Cir. 1947); Restatement, Torts, § 731.

Assuming, then, a relationship sufficient for protection, defendants next argue that plaintiff introduced no "com-

petent'' evidence on the pivotal question of confusion. As noted above, the trial of this case occupied some fifty days of litigation, during which time the court, sitting without a jury, admitted a plethora of evidence on the confusion issue, over the objection of the defendants and subject to a motion to strike at the close of the trial, which motion was ultimately denied. On appeal, defendants center their attack on the admission of much of the evidence.

While we believe that several of the defendants' evidentiary points are well taken and that consequently portions of the evidence should have been excluded, a careful review of the voluminous record of trial convinces us that there was sufficient competent and substantial evidence adduced at the trial to satisfy the standard of a likelihood of confusion and to render the admission of some disputed evidence non-prejudicial.

Actual examples of confusion were not required. *La-Touraine Coffee Co.* v. *Lorraine Coffee Co., supra; George W. Luft Co.* v. *Zande Cosmetic Co.,* 142 F.2d 536 (2 Cir. 1944). And the competent evidence of record denoting confusing similarity amply satisfies us that the findings of the district court on the question of a *likelihood* of confusion are not clearly erroneous.

At the trial four former Simmonds employees testified as to instances of the confusing similiarity which they had personally experienced relative to the respective names. A certain William Canner, formerly in charge of the overall sales operation of defendant, Simmonds Upholstering Co., testified that he recalled instances when potential Simmonds customers would inquire of him as to whether the defendant was the Simmons Mattress Company. He stated that he received these inquiries at such various places as Boston and Lawrence, Massachusetts, Albany, New York, and Hartford, Connecticut. David Levine, who had formerly been in charge of training the entire Sim-

monds sales force, also testified that he had received inquiries from potential customers as to the connection between the Simmonds Upholstering Company and the Simmons Company. Lucien Jutras, one-time Simmonds sales manager for the State of Maine and a portion of New Hampshire, also testified as to inquiries which he had received as to the connection between Simmons and Simmonds. Finally, Wilfred Dupuis who had served as Simmonds' office manager in Hartford, Connecticut, and later as a Simmonds salesman in Lowell, Massachusetts, also confirmed personal experiences denoting potential customer confusion obtaining between the Simmons—Simmonds name.

Among the literature which the Simmonds Company produced for its sales trainees was a booklet entitled "Questions and Answers; Objections and How to Overcome Them." The purpose of this booklet was stated therein: "The mark of a successful salesman is to have a *convincing answer* at the tip of his tongue to any question or objection which a customer may offer. Very often such questions or objections can be *anticipated* by the trend of conversation and these objections can easily be knocked out by a complete knowledge of your subject." (emphasis in original)

Thereafter, the very first question which the Simmonds Company apparently felt it essential that the salesman anticipate was the following:

> "Q. Are you the Simmons Mattress Company? A. No, Mam, we are the Simmonds Upholstering Company, the world's largest reupholsterers. The Simmonds (sic) Mattress Company is a good company, the leaders in the mattress field. We are the world's largest and the leaders in the reupholstering field."

There is little question that the sample customer inquiries and suggested replies contained in the foregoing booklet,

which was introduced at the trial, were based on past salesmen's experience. The fact that the very first question to be "anticipated" by the Simmonds salesman dealt with the relationship between Simmons and Simmonds speaks volumes as to the doubtful state of the public mind on this question and on the frequency with which the question was raised. Proclivity towards confusing similarity cannot be gainsaid.

Baker himself readily recognized the names Simmons and Simmonds as a fertile source of potential confusion to prospective customers. From 1951 through 1957 in Providence, Rhode Island, one Abraham Adler operated businesses styled variously as "H. Simmons Upholstering Co." and "H. Simmons Decorators." In October 1957 in the Superior Court of Rhode Island, defendant Simmonds Upholstering Co., Inc., successfully enjoined Adler from using the Simmons name in connection with his enterprises. The bill of complaint in the Rhode Island action, introduced here, was personally signed by Baker. It states in effect that the name Simmons and Simmonds are one and the same or at least would be regarded as such by prospective customers in the relevant market. In the language of defendant's complaint:

> ["Simmonds Company states] . . . that the use of these names (Simmons) as associated with this particular business tends to mislead, confuse and deceive the general public and the customers of your Complainant because (a) the business operations of the Respondent under both said trade names are of the same type as those carried on by your Complainant, and because (b) the Respondent has appropriated the name of your Complainant, Simmonds, and is using it in said business operation as "Simmons," which is phonetically the same although spelled slightly different."

"6. That your Complainant has no business connection with the Respondent, but the use of said name, Simmons, by the Respondent has and will continue to deceive, confuse and mislead your Complainant's customers and the general public to believe that the Respondent is affiliated with or authorized to deal for your Complainant, when, in fact, no such affiliation or authorization exists."

All of the foregoing evidence supports the trial court's finding of a likelihood of confusion. However, it is clear from his opinion that the district judge also predicted his finding of a likelihood of confusion on his own comparison of the respective names. Thus he stated that "the name 'Simmonds' as it has been used in the conduct of the Defendant's business is indistinguishable when spoken from 'Simmons.'"

It appears that in this class of case it is open to a trial judge, drawing on his own experience and observation, to make an informed judgment as to the likelihood of confusion apt to be spawned by strongly analogous symbols. Compare *Eastern Wine Corporation* v. *Winslow-Warren, Ltd.*, 137 F.2d 955 (2 Cir. 1943) with *LaTouraine Coffee Co.* v. *Lorraine Coffee Co., supra.* See Kaplan and Brown, Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Works, (1960 ed.), p. 492. Of course in this situation where the district court makes such a comparative appraisal to the extent that his conclusions are based "solely on the names themselves, we are in as good a position as the trial judge to determine the probability of confusion." *Eastern Wine Corporation* v. *Winslow-Warren, Ltd., supra,* at 960.

In the present case we have no hesitation in confirming the district court's conclusion. With the exception of the letter "d" occurring as its penultimate character, "Simmonds" is identical in spelling with Simmons. What was

said in *LaTouraine Coffee Co.* v. *Lorraine, supra,* is equally applicable here:

> ". . . Defendants have attempted to distinguish 'Lorraine' from 'LaTouraine' on the basis of the number of letters and syllables in the words, but this form of technical gymnastics is not determinative. (citations omitted) The initial letters and the last syllables—probably the parts of any word which impress themselves most firmly upon the memory—are identical . . ." Id. 117.

Even in the mouths of defendants' agents at the trial the two words came forth as phonetic twins. Perhaps on the tongues of linguists or precisionists, variations of articulation could be perceived. However, to the ear of the average person the two names would pass as one. Similarly, we believe that few but the discriminating of eye would, upon visual examination, readily perceive the subtle spelling gradation obtaining between the two names. In sum, on its face, we believe that the name Simmonds is inherently capable of generating confusing similarity with the name Simmons.

Finally, there is another aspect of this case which impinges on the question of infringement and its corollary—confusion. That factor relates to the good faith of the defendant Baker in electing to do business under the "Simmonds" name. If it can be shown that the selection of a name or symbol is part of a calculated or preconceived plan to play on the drawing power of a "congenial symbol" then this factor will assuredly enhance a plaintiff's position on the issue of likelihood of confusion. *LaTouraine Coffee Co.* v. *Lorraine Coffee Co., supra; Eastern Wine Corporation* v. *Winslow-Warren, Ltd., supra;* Restatement of Torts, § 729(b) and comment (f).

We believe that the present record amply sustains the trial court's finding that at the time Baker embraced the

"Simmonds" name he was aware that the symbol was likely to lead to confusion. Confusion, it might be added, which could only inure to his benefit.

Baker testified that he was aware of the Simmons name and its reputation at the time that the Simmonds name was selected. Inasmuch as Baker had been engaged in the retail furniture business for a number of years, any other reply would have been unworthy of belief.

As noted previously, in Baker's own testimony, at the time that he commenced his reupholstering operation, the Baker Furniture Store enjoyed a good name and reputation in the Lawrence, Massachusetts, area. Despite this fact, he eschewed the Baker name (and, if his testimony is to be credited, "Baker's" presumptive good will and customer allegiance) for the "Simmonds" designation upon expanding into the reupholstery field. No one in the Baker family or employ could lay claim to the "Simmonds" name and there was no discernible reason—apart from the reason supplied by this litigation—why the name "Simmonds" should have been selected.

Testifying at the trial on the selection of the name, Canner, Baker's right hand man in the early stages of the business, could only say:

> "Q. . . ., I ask you again, did you have any earlier discussions with Mr. Baker as to this name, the Simmonds Upholstering Company, for this business? A. You mean as to how we arrived at that name?
>
> "Q. Did you dicsuss it—this name with Mr. Baker? A. We discussed what name we might use.
>
> "Q. When did you discuss this? A. That was before we started up, or six months after, when I came to work for him.
>
> "Q. Did you discuss the name Simmonds Upholstering Company at that time? A. Well, yes, we discussed

several names. We thought we would use a name that would be a good name.

"Q. How did you arrive at the name Simmonds Upholstering Company? A. That was Mr. Baker's choice of a name."

Baker's nomination of "Simmonds" as his choice for a "good name"—a name without connection to himself or family—can thus be either be put down to a flight of imaginative fancy or to a calculatedly deliberate attempt to trade on a name well known in the market place We believe the record compels the acceptance of the latter.

We are confirmed in our belief that Baker acted in bad faith by his brazen attempt to establish rights in the Simmonds name extending back to 1899, the very year that plaintiff and its predecessors began to use the name Simmons, by means of a false and spurious bill of sale which Baker used to deceive the Boston Better Business Bureau and the Superior Court of Rhode Island.[4]

For all of the foregoing reasons we believe that the

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[4] Defendants have argued laches as an affirmative defense. The record showed that plaintiff did not become aware of the defendants existence until the summer of 1951. At that time plaintiff's attorneys sent notice of infringement to the defendants. Evincing concern that the defendants might have a legitimate claim to the name "Simmonds," plaintiff inquired of the defendants' counsel whether any one in the defendants' organization bore the name "Simmonds." This inquiry was ignored. Thereafter, the plaintiff proceeded to monitor the activities of the defendants. In 1952 plaintiff cooperated with a Federal Trade Commission investigation which led to a 1953 cease and desist order against Baker and his associates. Plaintiff successfully opposed defendants' application for registration of the name "Simmonds" as a service mark for reupholstering furniture in a patent office proceeding in 1957-58. The present suit was instituted on October 10, 1958.

It may well be true that plaintiff could have acted with more expedition in instituting the present suit but in view of defendants' calculated design to trade upon plaintiff's reputation and his reliance upon a fake document as to the origin of his company, we do not believe that he is in any position to invoke the defense of laches.

finding of the district court on the likelihood of confusion is amply supported by the record.

We turn then to defendants' contention that plaintiff's "Motel-Hotel Sign Program" violated the anti-trust laws of the United States—specifically Section 3 of the Clayton Act and Sections 1-3 of the Sherman Act. Defendants argue that if it can be demonstrated that plaintiff has violated the anti-trust laws, then under Section 33(b)(7) of the Lanham Act, 15 U.S.C. § 1115(b)(7), this violation will serve as an absolute defense to plaintiff's suit on its trademark.

The relevant facts bearing on defendants' contention may be briefly summarized as follows. Since 1954 plaintiff has had available for lease to qualified hotels and motels a sign bearing the legend "Sleep Best on Beautyrest by Simmons",[5] as well as roadside signs bearing the trademark "Beautyrest" together with the name of the motel. Since 1958 the wording on this sign has been changed to read "Ask for Beautyrest By Simmons."

Under the plaintiff's program the sign was leased or licensed to the motel owner for a fee of $15.00 (a loss figure to plaintiff), provided that the individual owner complied with certain conditions stipulated by plaintiff. The most critical condition of the program, as viewed by defendants, was the fact that the signs would only be leased to and displayed by motel owners who were fully equipped with plaintiff's "Beautyrest" mattresses. Thus, the owner who was already fully equipped with Beautyrest mattresses might immediately obtain the sign and participate in the program. An owner who was not so equipped could not obtain the sign until he changed to Beautyrest.[6] Moreover,

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[5] As noted above, this legend is covered by Registration No. 661,772 on file with the United States Patent Office.

[6] Since 1958, plaintiff has permitted motel owners who are not fully equipped with Beautyrest mattresses to display the sign provided

an owner who at one time had a full complement of Beautyrests and thus qualified for the program would have to return the sign and drop out of the program upon the use of a rival mattress in his establishment.

The record indicates that plaintiff annually circularizes the motel-hotel trade to alert it to the existence of its sign program and, in a further effort to promote the program, runs an advertisement in a national magazine inviting the traveling public to stop at motels displaying plaintiff's sign. The names of the participating establishments—those who have the signs and are thus equipped with Beautyrests—are contained in this ad.

The thrust of defendants' argument is that the plaintiff's sign program constitutes an illicit "tying" arrangement in which the sign constitutes the "tying" product and the Beautyrest mattress the "tied" product. Through this device, under defendants' view, the plaintiff has effectively blocked off and foreclosed a substantial segment of the mattress market from plaintiff's competitors.

Section 3 of the Clayton Act, 15 U.S.C. § 14, dealing with tying arrangements, provides as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale with the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the

(1) they agree to become 100% equipped with such mattresses within five years and (2) when applying for the lease order at least 20% of the number of such mattresses. The fact that during this transitional period a given hotel or motel might be only partially equipped with Beautyrests undoubtedly accounts for the change in the signs' message from "Sleep Best On Beautyrest By Simmons" to "Ask for Beautyrest By Simmons."

> United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. (Oct. 15, 1914, ch. 323, § 3, 38 Stat. 731.)"

Tying arrangements are condemned under Section 1-3 of the Sherman Act as "contracts in restraint of trade." While we must confess to having experienced some initial reluctance to accept defendants' contention that the plaintiff's sign program might, under any view, be considered a tying arrangement within the meaning of the antitrust statutes, reflection has persuaded us that strictly speaking the program might be said to fall within the literal language of the Act. Having thus concluded, defendants urge that the sign program should be struck down as "per se" illegal under the cited statutes as they have been construed by the Supreme Court.[7]

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[7] The concept of a "per se" violation in connection with tie-in contracts was articulated in *International Salt Co.* v. *United States*, 332 U.S. 392 (1947). In that case the International Salt Co. would only lease its patented salt-dispensing machines upon the condition that the lessees purchase all the salt that might be required for use in the machines from them. In affirming a summary judgment holding the contracts to be illegal under section 3 of the Clayton Act as well as section 1 of the Sherman Act, the Court stated that it was "unreasonable, *per se*, to foreclose competitors from any substantial market. . . . The volume of business affected by these contracts [a $500,000 annual volume] cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious." 332 U.S. at 396.

Thereafter the evidentiary distinctions between establishing a tie-in violation under the Clayton Act as distinguished from the Sherman Act were synthesized by the Court in *Times-Picayune* v. *U. S.*, 345

On the facts of the record we cannot accept defendants' position. Thus while we believe that the instant arrangement may well fit within the generic label of a "tying" device, we are not at all convinced that it is an improper one. As we stated in *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F.2d 653, 655 (1 Cir. 1961), cert. den. 368 U.S. 931: "We may agree with the plaintiff that the compulsory joining of two 'separate' articles is a per se violation of the act. This statement, however, solves nothing." In that case, construing certain language in *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), and relying on *United States* v. *Jerrold Electronics Corporation*, 187 F.Supp. 545 (D.C.E.D.Pa. 1960), aff'd Per Curiam, 365 U.S. 567 (1961), we held that business arrangements which conceptually could be styled "tie-ins" might be exculpated from the reach of the anti-trust laws if the arrangement was actuated by or could be explained on the basis of a

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U. S. 594 (1953) in the following terms: A tie-in arrangement will violate the Clayton Act "when the seller enjoys a monopolistic position in the market for the 'tying' product, or if a substantial volume of commerce in the 'tied' product is restrained;" and the practice will contravene the Sherman Act "whenever both conditions are met." 345 U.S. at 608-609. As thus formulated a more demanding burden of proof was required under the Sherman Act.

In *Northern Pacific Railway Co.* v. *U. S.*, 356 U. S. 1 (1958), the Court apparently reverted from the requirement of demonstrating the market dominance or "monopolistic" position of the defendant and substituted the less demanding test of a "sufficient economic power to impose an appreciable restraint on free competition in the tied product."

Thus in the instant case, before we might invoke any "per se" concepts, we would have to satisfy ourselves that the volume of commerce affected by the present arrangements should be regarded as substantial within the teaching of the above cited cases. The precise volume is a matter of dispute between the parties and the district court made no specific finding on this question. The case would have to be returned to the district court for a determination of this issue. Similarly we would have to rule that Simmons' 20% of the mattress market in the United States gave them a "sufficient economic power to impose an appreciable restraint on free competition in the tied product." In view of our disposition of the case, neither of these questions need be decided.

legitimate business justification as opposed to an improper motive, e.g., desire to increase market control through the economic leverage supplied by the tying arrangement.

We believe that in the instant case the motive actuating the requirement that an establishment displaying the Simmons sign possess all Simmons products is clearly within the exculpating principles outlined in *Dehydrating Process and Jerrold, supra.*

Focusing, for the moment, solely on the "tying product," we may start with the assumption that it was a desirable and legitimate aspiration of the Simmons Co. that its signs be hung on as many quality motels and hotels as possible. The signs served a *bona fide* advertising purpose and, presumably the greater the exposure accorded the Simmons name the more salutary would be the resultant impact on its business. Simmons could assuredly take active steps in the endeavor to foster this end.

Similarly when viewed from the aspect of the motel owner—at least those embracing the program—the Simmons sign was assuredly regarded as a genuine asset. Undoubtedly it was deemed a real, if subtle, inducement to the prospective tourist and a veiled assurance to those familiar with the Simmons name that a stop at the motel in question would insure a restful night's sleep. Again, to the owner thus disposed, it was an entirely legitimate aspiration that he obtain a Simmons sign.

Therefore, viewed *in vacuo,* plaintiff had the right to effect a widespread dissemination of its advertising and the individual owners undoubtedly had a coequal right to hang the signs. Defendants do not nor could they quarrel with these rights. It is only when the signs are "tied" to the mattresses that they dispute their validity.

However, if "tie" be the word, then we believe that plaintiff had an eminently legitimate interest to protect in "tying" or conditioning the use of the signs on the pur-

chase of its mattresses. There is no question that a legend appearing on a motel which invited the travelling public to "Sleep Best on a Beautyrest by Simmons" would be accepted at face value—as surely it is intended—that the motel features the Simmons mattresses on its beds. Quite obviously if the motel in fact did not have the Beautyrest mattress in its rooms but rather had an inferior brand, then the Simmons name, reputation and good will predictably might well suffer. In short, where the clear import of the sign program was to convey the message that a Beautyrest awaited the traveler inside, the Simmons Co. had ample justification in seeking to insure that the realization met this expectation. Simmons had a right, indeed a duty, to insure the truthfulness of its advertising and to exclude the possibility that a careless or capricious innkeeper might short-change his guests with a different mattress.

Thus we feel that while the instant arrangement might technically be deemed a tie-in, we do not believe that it is an illegal one nor one which presents the evils at which the anti-trust statutes were aimed.

Defendants also contend that one of the plaintiff's cooperative advertising plans was violative of Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson Patman Act. It is defendants' contention that this program as carried out by Simmons conferred advertising advantages upon the larger retail outlets that were not available to smaller stores. Defendants' attack centers upon the adequacy of the notice concerning the program received by the smaller Simmons dealers. Upon careful consideration of the entire evidence bearing on this contention, we cannot say that the plaintiff indulged in any discrimiation in connection with its advertising program and thus we reject defendants' arguments on this point.

In view of our determination that Simmons has engaged in no violation of the anti-trust laws, it is unnecessary that we express any opinion on defendants' contention that an anti-trust violation, if proven, would serve as an absolute defense to a trademark action under the Lanham Act.

A judgment will be entered affirming the judgment of the district court and remanding the case to that court for the allowance of counsel fees.

United States Court of Appeals
For the First Circuit

No. 6137.

ABRAHAM (ABE) BAKER, INDIVIDUALLY, AND D/B/A SIMMONDS UPHOLSTERING COMPANY,
DEFENDANT, APPELLANT,

v.

SIMMONS COMPANY,
PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges.*

James M. Malloy, with whom *Ralph Warren Sullivan* and *Malloy, Sullivan & Sullivan* were on brief, for appellant.

Francis A. Even, with whom *William E. Anderson, James J. Schumann* and *Anderson, Luedeka, Fitch, Even & Tabin* were on brief, for appellee.

OPINION OF THE COURT.

December 26, 1963.

HARTIGAN, *Circuit Judge.* This is an appeal from a judgment of the United States District Court for the District of Massachusetts entered March 19, 1963, awarding plaintiff-appellee, Simmons Company, the amount of $1,094,779.94 damages and counsel fees in an action involving trade-mark infringement and unfair competition.

Defendant-appellant, Abraham Baker, individually and doing business as Simmonds Upholstering Company, was found guilty in the United States District Court for the

District of Massachusetts of trade-mark infringement in violation of the Lanham Act, 15 U.S.C. § 1114 (1958), and unfair competition.[1] The Simmons Company, a leading manufacturer of furniture possessing a "sleep feature," as well as a manufacturer of furniture for a variety of purposes and rooms, was found to be harmed by defendants' use of the name "Simmonds" in the conduct of their business of upholstering and reupholstering furniture when use of such trade-name was likely to cause, and had caused, confusion with the plaintiff among ordinary purchasers. An injunction was issued against the defendants and the plaintiff was held entitled to damages and attorneys' fees. *Simmons Company* v. *Baker*, 200 F. Supp. 149 (D. Mass. 1961).

After this court affirmed the aforementioned judgment, *Baker* v. *Simmons Company*, 307 F.2d 458 (1st Cir. 1962), the district court referred plaintiff's claim for damages to a Master "to hear the parties and their witnesses, and to report to the Court his findings and conclusions of law thereon on the question of damages."

The Master held five days of hearings during which time four witnesses testified concerning the activities and financial transactions of the defendants. On January 22, 1963 the Master filed his report. He found the defendants jointly liable to the plaintiff in the total sum of $475,473.47. The district court doubled the Master's figure—an act of judicial discretion provided for in § 1117 of the Lanham Act—and included $143,833.00 counsel fees and expenses. Judgment was entered for the plaintiff in the amount of $1,094,779.94.

The first four points raised by appellant can be quickly

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[1] Also defendants and found guilty were Simmonds Upholstering Co., Inc., and New England Upholstering Co., Inc., both of which were solely owned by Baker, and Simmonds Sales System, Inc., in which Baker held the controlling shares.

settled. (1) We find no merit in appellant's argument that the award of damages should have been barred by laches and the Massachusetts statute of limitations. On the question of laches we defer to our prior opinion, *Baker* v. *Simmons, supra* at 466 n. 4 where that issue was negated. Also in that opinion we found defendants had relied on a fake document in order to establish rights in the "Simmonds" name extending back to 1899 and had, in fact, succeeded in deceiving the Boston Better Business Bureau and the Superior Court of the State of Rhode Island. The Massachusetts statute sought to be invoked by appellant saves from its operation causes of action which are fraudulently concealed. Mass. G. L. Ch. 260 § 12.

(2) It is complained that the Master's disallowance of certain costs was improper. Here we are restrained by the principle that the findings of the Master are entitled to great weight and should not be disregarded unless clearly wrong. *Parker* v. *Interstate Trust & Banking Co.*, 56 F.2d 792 (5th Cir. 1932). We find sufficient evidence to sustain the Master's findings.

(3) Nor was it improper for the Master to award damages on the basis of gross sales of defendants. While some of the goods sold by defendants did not compete with those sold by plaintiff,[2] they were all sold under the name "Simmonds." A trade-mark infringer is liable as a trustee for profits accruing from its illegal acts even though the owner of the marks was not doing business in the consuming market where the infringement occurred." *Blue Bell Co.*

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[2] About forty percent of defendants' gross sales could be considered as limited to the reupholstering field. The district court found that whole defendant posed as a "reupholsterer," more than sixty percent of his gross sales was derived from the practice of "restyling" in the process of alleged "reupholstering." This "restyling," the district court found, was actually a subterfuge under which defendant Baker sold his customers new furniture under the representation that it was their old furniture "restyled." *Simmons Company* v. *Baker*, *supra* at 153.

v. *Frontier Refining Co.*, 213 F.2d 354, 363 (10th Cir. 1954) and cases cited therein. See also *Admiral Corporation* v. *Price Vacuum Stores*, 141 F. Supp. 796 (E.D.Pa. 1956).

(4) Finally, there is more than sufficient authority for the allowance of counsel fees in Lanham Act actions where the defendant is found guilty of fraud and palming-off. *Wolfe* v. *National Lead Company*, 272 F.2d 867 (9th Cir. 1959); *Keller Products* v. *Rubber Linings Corp.*, 213 F.2d 382 (7th Cir. 1954); *Admiral Corp.* v. *Penco, Inc.*, 203 F.2d 517 (2d Cir. 1953).

The fifth point raised by appellant contains more substance. The appellant contends that it was error for the Master to enlist *ex parte* the assistance of an independent accountant to furnish him with profit and loss statements for all the defendants.

In his report the Master recited, *inter alia*, that one Ames, "a public accountant," was called by defendants but that he discarded Ames' testimony "as not being of probative value." He further stated that the profit and loss statements introduced by the defendants and prepared by one Anderson, "a self-employed auditor," were "incomplete" and that he discarded them "as being not too reliable."

"[I]n their place I caused an outstanding and competent firm of certified public accountants to furnish me with profit and loss statements prepared from the ledgers of the defendants which were also placed in evidence. I am adopting these latter profit and loss statements as being most reliable." In a subsequent letter to the court, supplementing this report, the Master stated that he had employed "outside help" only after making "decisions as to which items in my mind, were disallowable. The accountants only, for my own purposes, diagnosed the figures which appeared in the books themselves, which were placed in evidence, and they only aided me in their proper allocations. I deem

this procedure to be on the same basis as if one were to go to a dictionary for a definition or to any reference book for guidance."

This is not a statement that the Master had already "made all the determinations as to allocations of expenses and deductions" as the lower court stated in approving the report but only that he had decided upon general items or categories, and that he used the accountant to interpret the books for the express purpose of making the dollar and cent allocations therein.

The Master's conclusion in his report that he found his accountant's profit and loss statements the most "reliable" ones seems a far cry from equating them with "a dictionary . . . definitions or . . . reference book."[3] Whatever "help" the accountant furnished, it went beyond this. We believe it apparent that the accountant served as an ordinary expert witness to interpret the books. Even if the books were clear, which quite evidently they were not, appellant now finds itself bound by whatever the accountant told the Master, without opportunity to cross-examine him either as to his qualifications, his methodology, and the extent of his examination of the books or of his understanding thereof, or as to his actual conclusions. It may be that a Master may himself call his own witness,[4] but that he should call him in camera, and without right of cross-examination is, to say the least, a most irregular act.

The Master's unquestioned right to disregard any evidence which he thinks is of doubtful probative value, *Aycrigg* v. *United States*, 136 F. Supp. 244 (N.D.Cal. 1954),

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[3] By the rule of ejusdem generis it is assumed reference book to mean a book like a dictionary, containing matters, essentially undisputed, as to which one could properly take judicial notice. *Cf.* 9 Wigmore, Evidence § 2484 (3d ed. 1940) "The trial judge . . . may consult any source of information or topics subject to *judicial notice*. . . ." (Ital. author's)

[4] But see 5 Moore's Federal Practice ¶ 53.06, at 2953 (2d ed. 1951).

does not enable him to substitute evidence of his own without following ordinary judicial procedures.

Judgment will be entered vacating the judgment of the district court and remanding the case for further proceedings not inconsistent with this opinion.

United States Court of Appeals
For the First Circuit

No. 6383.

ABRAHAM BAKER,
DEFENDANT, APPELLANT,
v.
SIMMONS COMPANY,
PLAINTIFF, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Maurice Schwartz for appellant.
William E. Anderson, with whom *Francis A. Even*, *James J. Schumann* and *Anderson, Luedeka, Fitch, Even & Tabin* were on brief, for appellee.

OPINION OF THE COURT.
April 2, 1965.

HARTIGAN, *Senior Circuit Judge* (by designation). This is an appeal from an order and judgment of the United States District Court for the District of Massachusetts entered June 8, 1964, overruling objections to a master's report and awarding appellee $1,094,779.94 in damages. Said master's report was submitted May 1, 1964, after further hearings were conducted in accordance with a judgment of this court entered December 26, 1963. *Baker* v. *Simmons Company*, 325 F.2d 580 (1st Cir. 1963). In an earlier opinion we affirmed the district court's issuance of

an injunction. *Baker* v. *Simmons Company,* 307 F.2d 458 (1st Cir. 1962).

After we remanded this case on December 26, 1963, the district court referred it to the master to permit the parties to examine the accountant previously used by the master in preparing his findings. Appellant now contends that the master, in his second report, merely rubber-stamped his first report and that in any event his report is not supported by the evidence. At the second hearing appellant was content only to cross-examine the accountant, introducing no witnesses of his own in rebuttal. The master was entitled to rely on the accountant's testimony and, therefore, to adhere to his earlier assessment of damages.

Appellant also contends that he was prejudiced by remarks made by the district judge, heard by the master, to the effect that appellant was a "crook" and that he desired to get into bankruptcy. He cites cases standing for the proposition that litigants are entitled to a trial before a tribunal free from bias and prejudice. That no doubt is true. However, the assessment of damages was made by the master and not by the district judge. The only question, therefore, is whether the district judge's remarks in any way infected the proceedings before the master. In the light of our first opinion, *Baker* v. *Simmons Company,* 307 F.2d 458 (1st Cir. 1962), we scarcely think the district judge's remarks could have had prejudicial effect on him. In addition, the record fails to indicate any bias or prejudice by the master himself. We, therefore, need not reach the question of whether the district judge's remarks in fact amounted to a showing of bias or prejudice.

The record does not convince us that the appellant was prejudiced either by the district judge or by the master in the scheduling of the hearings before the master. It would appear from the record and from the time elapsed since

our last decision that counsel for appellant had adequate time to prepare and to try his case.

We find no merit in the other contentions raised by appellant.

Judgment will be entered affirming the judgment of the district court.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 58-1014-S

SIMMONS COMPANY,
PLAINTIFF,
v.
ABRAHAM (ABE) BAKER,
as an individual and also
d/b/a SIMMONDS UPHOLSTERING CO., INC.
SIMMONDS SALES SYSTEM, INC.
and
NEW ENGLAND UPHOLSTERING CO., INC.
DEFENDANTS.

ORDER

The Court having considered the objections of the Defendant Baker to Second Report of Master, and the Motion of the Plaintiff to overrule those objections, to confirm the Second Report of Master, and to enter judgment thereon and in accordance with findings earlier made by the late Judge McCarthy, and having heard the arguments of counsel for the Plaintiff and counsel for the Defendant Baker,

IT IS HEREBY ORDERED that:

1. Each and everyone of Defendant Baker's objections to Second Report of Master be, and the same hereby is, overruled.

2. The Second Report of the Master, reaffirming his initial report after the further hearings ordered, is hereby confirmed, and the findings and conclusions of the Special Master in said initial and second reports are hereby adopted as the findings of fact and conclusions of law of this Court, with the further clarification that the liability of the Defendants is both joint and several.

3. The findings earlier made by the late Judge McCarthy in his Memorandum on Motions, dated March 19, 1963, viz.,

(a) that in addition to the sum found by the Special Master to be owing to the Plaintiff, the Plaintiff is entitled to the further sum of $475,473.47, and

(b) that the Plaintiff is entitled to recover counsel fees and expenses in the further sum of $143,833.00,

are hereby noted, and those further sums shall be allowed and included with the damages of $475,473.47 allowed by the Special Master.

4. The Plaintiff is therefore entitled to have judgment against the Defendants, jointly and severally, in the total amount of $1,094,779.94, with interest from the date of entry thereof, exclusive of taxable costs, and judgment shall be entered accordingly.

Enter:

(s) GEORGE C. SWEENEY
Chief Judge

June 8, 1964

JUDGMENT

In accordance with the Order of the Court of June 8, 1964.

IT IS HEREBY ORDERED:

Judgment is entered for the Plaintiff, SIMMONS COMPANY, in the above-entitled cause, against the Defendants jointly and severally, in the amount of $1,094,779,94, exclusive of taxable costs, together with interest thereon from the date of entry hereof.

By the Court:

(s) HELEN I. TWEEDY
Deputy Clerk

Filed
In Clerk's Office
Jun 8 4 52 PM '64
U.S. District Court
District of Mass.

June 8, 1964

ENTER:

(s) GEO C. SWEENEY
Chief Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 58-1014-S
Unfair Competition
and
Trademark Infringement
Equitable Relief Sought

SIMMONS COMPANY,
Plaintiff,
vs.
ABRAHAM (ABE) BAKER
541 Haverhill Street
Lawrence, Massachusetts, as an
individual and also d/b/a
SIMMONDS UPHOLSTERING COMPANY,

SIMMONDS UPHOLSTERING CO. INC.,
1 Chase Street, Arcadia Mill
Methuen, Massachusetts

SIMMONDS SALES SYSTEM, INC.,
1 Chase Street, Arcadia Mill
Methuen, Massachusetts
and
NEW ENGLAND UPHOLSTERING CO. INC.
1 Chase Street, Arcadia Mill
Methuen, Massachusetts.
Defendants

INJUNCTION

November 16, 1961

After hearing upon the merits in the above-entitled action and because of the findings of trade-mark infringement and unfair competition by the defendants it is

ORDERED the defendants, their agents, servants, employees

and attorneys and all persons in active concert and participation with them be and they hereby are restrained and enjoined from using the name "Simmonds" and from using any other name or representation which would lead the public to believe that defendants are associated with the Plaintiff.

By the Court

November 16, 1961 (s) WALTER J. HURLEY
Enter: *Deputy Clerk*

(s) WILLIAM T. MCCARTHY
United States District Judge

Appendix C

CONFLICTING OPINION

ANCHOR SERUM COMPANY
v.
FEDERAL TRADE COMMISSION.
No. 11164.
United States Court of Appeals
Seventh Circuit.
Dec. 17, 1954.

L. M. McBride, Chicago, Ill., James T. Welch, Washington, D. C., for petitioner.

Robert B. Dawkins, Asst. Gen. Counsel, James E. Corkey, Atty., Earl W. Kintner, Gen. Counsel, Federal Trade Commission, Washington, D. C., for respondent.

Before DUFFY, Chief Judge, and MAJOR and SCHNACKENBERG, Circuit Judges.

MAJOR, Circuit Judge.

This is a petition by Anchor Serum Company, a corporation, to review and set aside a cease and desist order issued February 16, 1954, by the Federal Trade Commission (respondent), at the conclusion of proceedings on a complaint charging petitioner with violation of § 3 of the Clayton Act, 15 U.S.C.A. § 14. The order is directed not

only at the corporate petitioner which alone was made a party to the complaint, but also at its "officers, agents, representatives, and employees."

Petitioner was incorporated in 1917, and since that time has been engaged in the manufacture, distribution and sale of various animal health products, principally anti-hog cholera serum and hog cholera virus, with its principal place of business at St. Joseph, Missouri. Since the year 1936, it has been licensed to produce and sell its products by the Bureau of Animal Industry, United States Department of Agriculture, Petitioner sells its products to customers variously denominated as wholesalers, dealers and consumers, located throughout the various states of the United States.

There are thirty-two manufacturers who produce, sell and distribute serum and virus in the same trade areas as petitioner and who are in competition with petitioner for customers who resell or use said products. All such manufacturers are known in the trade as either "lay" or "vet" producers, such characterization being determined by and descriptive of the type of customer to whom they sell. "Vet" producers sell principally to veterinarians or to wholesalers who resell exclusively to veterinarians, and "lay" producers sell through other channels, such as drug stores, farm bureaus, wholesalers, etc. Of the thirty-two manufacturers of such products, twenty-three are "vet" and nine are "lay" producers. Petitioner falls within the latter category and is the largest producer of that group. While petitioner is in direct competition only with other "lay" producers, it is in competition with all producers in the sense that they all compete for the ultimate consumer market, viz., the farmer-hog owner.

At the time this case was heard by the Commission, petitioner had contracts with sixteen wholesalers for the sale of its serum, virus and other pharmaceuticals. Five of

such wholesalers are designated by petitioner as "ex-branch wholesalers," which are located in different states and do business under the name of "Anchor Serum Company." They are thus designated because they were all at one time owned by petitioner and sold to the manager of the branch under a contract which authorized the new ownership to use petitioner's name and good will. Seven of the sixteen wholesalers are designated as "Anchor wholesalers," each of which does business under the name of "Anchor Serum Company." While these wholesalers are and always have been independent of petitioner, they have by contract acquired the right to use the word "Anchor" in their business operations. The remaining wholesalers, four in number, are co-operatives, namely, Illinois Farm Bureau Serum Association, Iowa Farm Serum Company, Missouri Farmers Association, Inc., and Arkansas Farmers Association.

The first of the contracts in controversy was entered into with Anchor Serum Company of Indiana (one of the five ex-branch wholesalers) April 30, 1943, and provided in part as follows:

> "* * * and in further consideration of the use by the parties of the second part of the word 'Anchor' as a part of their name in any partnership or other form of business association, approved in writing by the party of the first part, the parties of the second part agree to purchase from the party of the first part, all their requirements of products manufactured and/or distributed by the party of the first part * * *."

In 1947, petitioner entered into contracts with the Illinois Farm Bureau Serum Association and the Iowa Farm Serum Company, each of which was the largest distributor of serum and virus in its state, which contracts obligated the purchasers "to buy, and does by these presents buy, and agrees to pay for all of its requirements of serum,

virus and other products at the prices and on terms specified herein."

We need not further relate the inhibiting provision contained in all of the contracts because what we have set forth is typical of the provision which each contains. Furthermore, petitioner concedes that all of the contracts contain "requirements" language which means that the contracting party is obligated by the contract to purchase from the petitioner all its requirements of the designated products.

Section 3 of the Clayton act, so far as here pertinent, makes it unlawful to "make a sale or contract for sale of goods, wares, merchandise, * * * on the condition, agreement, or understanding that the * * * purchaser thereof shall not use or deal in the goods, wares, merchandise, * * * of a competitor or competitors of the * * * seller, where the effect of such * * * sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Petitioner devotes much effort to what we think is an erroneous approach to the essential issue for decision, as is disclosed in its enumeration of the contested issues which are stated as follows:

> "1. Do the so-called requirements contracts of the Petitioner impose on any one or more of the sixteen customers who are parties to those contracts, illegal conditions of sale prohibited by Section 3 of the Clayton Act?
>
> "2. Even if it be determined that any one or more of those contracts impose illegal conditions of sale, does the record support the conclusion that the contracts in question have substantially lessened competition and tend to create a monopoly?"

Having thus stated the contested issues, petitioner in its brief presents its argument under two headings, (1) "No Contract Under Review Imposes An Illegal Condition On Any Of Petitioner's Customers," and (2) "Petitioner's Contracts Have Not Substantially Lessened Competition And Do Not Tend To Create A Monopoly."

[1] In Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356, 42 S.Ct. 360, 362, 66 L.Ed. 653, the court stated, with reference to the section of the Clayton Act now under consideration:

> "Section 3 condemns sales or agreements where the effect of such sale or contract of sale 'may' be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word 'may' was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial."

This statement squares with the plain, unambiguous language of the section and, so far as we are aware, has not been deviated from in any subsequent decision of the Supreme Court.

Thus, in our judgment, there was no legal issue before the Commission as to whether the contracts were illegal *per se;* the only legal issue before the Commission, as it is here, was whether the contracts with their restrictive provisions were calculated to have the proscribed effect or consequences.

[2, 3] By reason of petitioner's false approach, it becomes engulfed in numerous contentions which we think are beside the issue. For instance, in some detail it relates the legislative history of the Clayton Act, apparently for the purpose of demonstrating that it was not the intention of Congress to outlaw all so-called "requirements" contracts. The short answer to that argument is that Congress by the plain language which it used did not do so. Only contracts which had the proscribed effect were made unlawful. Furthermore, the plain language which Congress employed dispels all purpose in resorting to legislative history. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356, 42 S.Ct. 360, 66 L.Ed. 653. There was evidence that some of the contracts, perhaps all, were entered into as a result of negotiations initiated by the purchasers rather than by petitioner. From this premise it is argued that the terms were not imposed by the petitioner and that as a result there was no illegality, even though the contracts had the proscribed effect on competition. The Commission rejected this argument and so do we. Certainly there is nothing in the language of the Act from which it can even be inferred that two classes of contracts were contemplated, depending upon whether the contract was initiated by the seller or the buyer. We think it is a novel theory that the rights, liabilities and obligations of parties to a contract depend upon which of the parties propose it. And we think it immaterial whether the contract was for the benefit of the seller or the buyer. In any event, the determining factor is whether the contract had the proscribed effect.

[4] As already noted, five of the contracting purchasers are designated as "ex-branch wholesalers," and seven are designated as "Anchor wholesalers." Those included in the former category were at one time owned by petitioner but sold to the contracting purchaser with the right to use petitioner's trade name, "Anchor." Those in the latter

category have likewise acquired by the terms of the contracts the right to use petitioner's trade name, "Anchor." Substantially the same argument is made as to all the purchasing wholesalers included in these two categories, the effect of which is that contracts with these purchasers were necessary in order to assure the proper use and protection of petitioner's trade name. It is asserted that each of them can do business with any competitor of petitioner simply by surrendering the privilege of using petitioner's trade name, and that for this reason the contracts contain no illegal condition. A short answer to the contention on this score is that § 3 makes no provision or exception for such contingencies. Like all other contracts, they are illegal if they have the proscribed effect. Petitioner's contention on this point, if adopted, would permit an easy avoidance of § 3. Nothing more would be required by the contracting parties, irrespective of the effect which their contract might have upon competition, than that there be included in the contract the right or privilege on the part of the purchaser to use the trade name of the seller.

As might be expected, the Commission places much reliance upon Standard Oil Co. of California and Standard Stations v. United States, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371. Petitioner in its brief, consistent with its erroneous aproach to the real issue in the case, states, "* * * the Commission places great reliance in this case, presumably on the theory that the Court held the exclusive dealing contracts of Standard to be illegal *per se*." The Commission here makes no such contention and the Supreme Court in the Standard Oil Company case created no basis for such a theory. Moreover, the opinion in Standard Oil is of no benefit to petitioner, notwithstanding its profession to the contrary. It is true that the court on pages 306-308 of 337 U.S., on pages 1058-1059 of 69 S.Ct. of its opinion discusses "requirements" contracts in connection

with the Act here involved in a manner which might prove deceptive in the absence of a careful analysis of the entire opinion in connection with the result reached. The court, in contrasting the character of contracts here involved with "tying" agreements or devices, stated, 337 U.S. at page 306, 69 S.Ct. at page 1058:

> "Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and—of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibility of a predictable market."

It will be noted that the court was discussing the economic advantages which might be inherent in such contracts and then proceeded, following the quoted language, to enumerate a number of factors which might be relevant in determining such advantages from the economic standpoint. The court, however, as we understand the opinion, brushed aside these so-called economic advantages because of their irrelevancy under the plain language of § 3. Following the enumeration of the economic advantages, the court stated, 337 U.S. at page 308, 69 S.Ct. at page 1059, "Yet serious difficulties would attend the attempt to apply these tests." The court, in denying the contention that there must be proof that competition has actually been

impaired, stated, 337 U.S. at page 311, 69 S.Ct. at page 1060:

> "We are dealing here with a particular form of agreement specified by § 3 and not with different arrangements, by way of integration or otherwise, that may tend to lessen competition. To interpret that section as requiring proof that competition has actually diminished would make its very explicitness a means of conferring immunity upon the practices which it singles out. Congress has authoritatively determined that those practices are detrimental where their effect may be to lessen competition."

The court made reference to the legislative history of the Act, 337 U.S. at page 312, 69 S.Ct. at page 1061, and pointed out that the qualifying clause, " 'where the effect * * * "may" be to substantially lessen competition or tend to create a monopoly' ", was added only after the House and Senate bills reached Conference. On the following page, referring to the economic investigation which appellants in that case urged, the court stated, 337 U.S. at page 313, 69 S.Ct. at page 1062:

> "To insist upon such an investigation would be to stultify the force of Congress' declaration that requirements contracts are to be prohibited wherever their effect 'may be' to substantially lessen competition."

The crucial language upon which the court's decision was predicated is as follows, 337 U.S. at page 314, 69 S.Ct. at page 1062:

> "We conclude, therefore, that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patron-

> age, and it is clear that the affected proportion of retail sales of petroleum products is substantial. * * * Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity."

Thus, this pronouncement reduced to its simple form is that it is not necessary to show the actual impact which a "requirements" contract has on competition, but that it is sufficient if it possesses the potentiality to impede a substantial amount of competitive activity.

Petitioner attempts to bolster its erroneous interpretation of the Standard Oil case by relying upon a subsequent decision of the Supreme Court in Federal Trade Commission v. Motion Picture Advertising Service Co., Inc., 344 U.S. 392, 73 S.Ct. 361, 97 L.Ed. 426. This reliance is also of no benefit to petitioner. In the latter case the court had before it a proceeding instituted under § 5 of the Federal Trade Commission Act, 15 U.S. C.A. § 45. The court distinguished, 344 U.S. at page 397, 73 S.Ct. at page 364, the charge then before the court from a proceeding such as is here involved, that is, a proceeding under § 3 of the Clayton Act. The court did not even mention its previous decision in the Standard Oil case.

[5] Having rejected the false premise upon which petitioner seeks to review and set aside the order of the Commission, as shown by its statement of the contested issues as well as its erroneous interpretation of the Supreme Court decision in the Standard Oil case, there appears to be little if anything left to decide. Certainly there is no occasion to enter into a detailed discussion of the findings made by the Commission or the evidence relied upon in support thereof. That the findings are amply supported is hardly open to question. The Commission found not

only that the contracts involved furnished a vehicle for the potential impediment to a substantial amount of competitive activity but that they had actually done so. Specific instances are shown and found where the market for serum and virus was substantially foreclosed to producers other than petitioner by reason of the latter's "requirements" contracts.

Petitioner complains that the chief targets of the Commission's attack are the co-operatives, and particularly the Illinois Farm Bureau Serum Association and the Iowa Farm Serum Company. If such be the case, it is reasonable to think that it is because these two wholesalers are the most vulnerable to attack because of the large volume of business which they do, due to their system of distribution and the fact that they sell in the two largest hog producing states. The Iowa organization, for instance, has 137 dealer-members, located throughout the state's 99 counties, and the Illinois organization has 90 dealers, located throughout the various counties of Illinois.

The Commission found, in dollar volume, the amount of business which petitioner did with each of its sixteen contract holders for the years 1949, 1950 and 1951. Without reciting these figures, it is sufficient to note that the volume of business was substantial, and particularly is this so with reference to its two largest wholesale dealers, Illinois Farm Bureau Serum Association and Iowa Farm Serum Company, to each of which its sales during these three years amounted to around one-half million dollars per year. The findings clearly reveal the effect of petitioner's exclusive contracts with the two of its wholesale dealers just mentioned. For instance, Lederle Laboratories, a competitor of petitioner, sold to the Iowa Company serum and virus as follows: 1945, $56,757.57; 1946, $65,211.16; 1947, $17,943.14. The same competitor sold serum and virus to the Illinois Association as follows: 1945, $172,114.08; 1946,

$169,338.69; 1947, $125,903.10. After the year 1947, this competitor made no sales to either the Iowa Company or the Illinois Association. 1947 was the year in which both the Iowa Company and the Illinois Association entered into their exclusive agreements with petitioner. It is evident that this competitor was completely stymied in its effort to do business with these two contract holders, and the inescapable inference is it was because the latter were under obligation to make all their purchases from petitioner. A similar fate was met by the Diamond Serum Company, another competitor of petitioner, as disclosed by the findings.

It would require a naive mind to conclude, as petitioner would have us do, that the agreements under consideration could result in other than an adverse effect upon competition. Suppose, for instance, that a salesman for any of petitioner's competitors should attempt to sell to or to obtain an order for sale from any of petitioner's contract holders. Such an attempt would be barren of results because of the customer's obligation to petitioner, and this would be true even though the salesman offered a superior product on more favorable terms. It thus appears plain that the products handled by petitioner's exclusive contract holders are removed from the competitive area.

[6] We are not unsympathetic to the suggestion that the section under consideration is capable of producing harsh results, and it is more than possible that the situation before us is a fair example. If such be the case, however, it is the legislative and not the judicial branch of the government from which relief should be sought.

[7] Petitioner also raises the issue that the order under review is improperly directed against its "officers, representatives, and employees." Petitioner in support of its contention on this issue cites a decision of this court, R. J. Reynolds Tobacco Co. v. Federal Trade Commission, 7 Cir.,

192 F.2d 535. On the contrary, the Commission relies upon Regal Knitwear Co. v. National Labor Relations Board, 324 U.S. 9, 65 S.Ct. 478, 89 L.Ed. 661. The order in the Reynolds case was issued pursuant to the Federal Trade Commission Act, which was distinguished from the order of the Labor Board before the court in the Regal Knitwear case, on the ground that the order in the former case was wider in scope than that in the latter because "the unnamed 'officers, agents, representatives and employees' are not only subject to a contempt proceeding for the violation of a court's enforcement decree where equitable considerations prevail, but they are likewise subject to a severe penalty, to be recovered in a civil action." 192 F.2d at page 540. The distinction which we made in the Reynolds case, however, cannot be made here because the enforcement of this order is lodged exclusively in the appropriate Court of Appeals by § 11 of the Clayton Act, 15 U.S.C.A. § 21. It is, therefore, our view that the Regal Knitwear case is controlling here.

The petition to set aside respondent's cease and desist order is denied, and an appropriate enforcement decree will be entered upon presentation.